therefore be set aside. Taking into account all past and future contingencies, we are of the view that an award of $12,000/- for loss of earning capacity would be fair and adequate in this particular case.

For the above reasons we dismiss the appeal against liability but we allow the appeal against quantum. The order of the learned Judicial Commissioner on damages is set aside and substituted with the following order:—

1. Special damages — $300/- with interest at 3% per annum from date of accident to date of realization;

2. General Damages —

(i) pain and suffering and loss of amenities	$40,000/-
(ii) estimated cost of surgical operation of the hip and knee joint	$18,000/-
(iii) loss of earning capacity ..	$12,000/-
Total ..	$70,000/-

Item (i) of general damages shall be with interest at the rate of 6% per annum from date of filing the writ to date of trial and thereafter at 8% per annum until date of realization.

We order that the costs of this appeal be paid by the respondent and the deposit be refunded to the appellants. The order as to costs in the court below should remain.

Order accordingly.

Solicitors: *Tay, Tee & Nasir; Ranjit, Thomas & Kula*

MANICKAM v. INTHERAHNEE

[F.C. (Wan Suleiman, Seah & Mohamed Azmi F.JJ.) March 5 & September 17, 1984]

[Johore Bahru — Federal Court Civil Appeal No. 318 of 1982]

Family Law — Custody of infants — Welfare of infant — Wishes of child of 8 years of age — Consequence of uprooting child from surroundings — Care and attention of natural mother superior to that of step mother — Guardianship of Infants Act, 1961.

In this case the respondent had left the matrimonial home and had taken her younger child Anand, aged 4 years, to live with her. The elder boy, Nantha, remained with the appellant, his father, in Johore Bahru. The appellant had taken a second wife, with whom he had a child. The respondent applied for custody of both the children. The learned Judicial Commissioner allowed her application and the appellant appealed.

Held, dismissing the appeal: (1) the learned Judicial Commissioner had acted on the right principles, having in mind always that the paramount consideration is the welfare of the child;

(2) in this case the elder child being only 8 years of age at the time of the hearing and then in the custody of the appellant and his family could not reasonably be expected to express any independent opinion on his preferences;

(3) although by the order the child would be uprooted from the surroundings and from relatives to whom he had grown accustomed since 1977, the learned Judicial Commissioner in this case was correct in considering the wishes of the unimpeachable parent;

(4) the care and attention of the natural mother can reasonably be expected to be superior to that of a step-mother particularly one who has a child of her own and with every prospect of additions to the family.

Case referred to:

(1) *Re Thain* [1926] Ch. 676.

FEDERAL COURT.

E. Ramasamy for the appellant.
G. F. Nelson for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): The appellant is the natural father of 2 boys, Nantha Kumar (Nantha) and Anand Kumar (Anand) now aged 9 and 4 years respectively. By an Originating Summons dated January 7, 1982 the respondent, their natural mother had applied for custody of both the children. At the

time of the hearing, she had already left the matrimonial home and had custody of Anand who lived with her in Muar. Nantha, the older boy remained with the appellant, her husband, in Johore Bahru.

Before that the parties had stayed in the home of the appellant's mother along with the rest of his family. Her complaint was that she had been ill-treated by them as well as by the appellant.

In Muar the respondent and Anand live with her parents. In court she testified that her father had retired from Government service (he was a manual worker with the Telecommunication Department), presumably with pension, and not as the appellant suggested, a person of no fixed income. Both grandparents appeared in court to confirm that they were willing to maintain and care for Nantha. The respondent, Anand and the grandparents all live in a rented terraced house.

On November 22, 1981 appellant took a second wife, Devi. At the time of the hearing before the learned Judicial Commissioner, he and his other wife were still sharing a house with his mother, step-father, a brother and 2 sisters. Devi had, at the time the Judicial Commissioner made his order (December 18, 1982), already delivered her child and appellant admits that without depending on the pooled earnings of himself, his step-father, one brother and a sister, he would find difficulty in making ends meet. The pooled earnings amounted to about $1000/- per month whilst his personal monthly income was $330. This family unit had just obtained two low cost houses situated close together, so that at least one can reasonably conclude that there would be adequate room for all.

The respondent had never been divorced, though at the hearing the appellant said that because she had left him he did not regard her as a wife any longer. As an alternative to having both children in her custody, the respondent had expressed willingness to resume cohabitation with the appellant in Johore Bahru in a separate house, but there was no response to this offer.

Soon after the separation, from about May 1977, the appellant's mother had taken care of Nantha. The Welfare Officer's report on March 24, 1982 confirms that the child was being well looked after, and indeed recommends that he be left in the custody of the appellant.

In his Grounds of Judgment the learned Judicial Commissioner expressed satisfaction with the way the respondent had looked after the younger boy Anand. She had impressed him as a woman of character and responsibility. He was of the view that in the long term the care and attention of a natural mother would be superior to that of step-mother, particularly one having a child of her own, and with the possibility of having other children. He also saw merit in the brotherly companionship of 2 brothers living together. The support and sympathetic attitude of respondent's parents was another factor he had taken into account.

Though the appellant would like Nantha to be given into his custody, his counsel Mr. Ramasamy suggested that the boy should at least be placed in the custody of the paternal grandmother. Counsel had in mind, of course, section 88(1) of the Law Reform (Marriage & Divorce) Act, 1976 which enables the court, where exceptional circumstances make it undesirable that the child be entrusted to either parent, to place him in the custody of some other relative. As evidence of the affectionate bond between grandmother and grandchild, he referred to the numerous occasions when she was at pains to keep him in her company, even whilst she was working as a househelp in Singapore, after the respondent had left him. He also relied on the affidavit of the grandmother's then employer as evidence from an independent source of her competence and love for children, and what is of greater importance her love for this grandchild.

We were told that even if Nantha was in his grandmother's custody the recent acquisition by the family of the two houses in close proximity was another favourable factor to be taken into account since appellant's fatherly attention could be added to the grandmother's.

Section 88(2)(b) of the Act requires a Court, among other more important considerations, to have regard "to the wishes of the child, where he or she is of an age to express an independent opinion." Nantha was 8 years of age at the time of the hearing, and the failure of the learned Judicial Commissioner to question him is one of the grounds of complaint. We might as well deal with this question immediately and say that we do not think that a child of that age, then in the custody of the appellant and his family can reasonably be expected to express any independent opinion on his preferences.

Of more import is the consequence of uprooting this child from the surroundings and from relatives to whom he had grown accustomed since 1977. We are however inclined to agree with learned counsel for respondent that what was said by Eve J. in *Re Thain* (1) would also apply here. There, the child's mother had died and the father, being in the Royal Air Force, had for a long time not been able to look after the child. The child had been brought up by her aunt (her mother's sister) and uncle, and it has been suggested that it would be unkind to the child, when the father was eventually in a position to give her a home, to take her from her foster parents.

Eve J., at page 684 said:-

"It is said that the little girl will be greatly distressed and upset at parting from Mr. and Mrs. Jones. I can quite understand it may be so, but, at her tender age, one knows from experience how mercifully transient are the effects of partings and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.

As I said at the commencement of my judgment, I am satisfied that the child will be as happy and well cared for in the one home as the other, and in as much as the rule laid down for my guidance in the exercise of responsible jurisdiction does not state that the welfare of the infant is to be the sole consideration but the paramount consideration, it necessarily contemplates the existence of other conditions, and amongst these the wishes of an unimpeachable parent undoubtedly stand first."

We are also satisfied that the learned trial Judge had acted on the right principles, having in mind always that the paramount consideration shall be the welfare of the child.

Financially and otherwise the suitability of either side to be satisfactory custodians of Nantha appear to be equal, and no doubt before the advent of the stepmother, it may well be that the learned Judicial Commissioner would have decided not to order a change of custodian. But we agree with him that the care and attention of the natural mother can be reasonably expected to be superior to that of a step-mother, particularly one who has a child of her own and with every prospect of additions to the family. It would be reasonable to expect that in the tussle for love and affection, the step-child would be the loser. Giving custody to the grandmother, in the circumstances, would not improve the position.

We therefore dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *E. Ramasamy & Co.; G. F. Nelson & Co.*

TAHANSAN SDN. BHD. v. TAY BOK CHOON

[F.C. (Salleh Abas L.P, Wan Suleiman & Seah F.JJ.) July 11 & September 17, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 55. of 1983]

Company Law – Winding-up of Company – Just and equitable ground – Affidavit evidence – Question of fact – Whether oral evidence should have been taken – Companies (Winding-up) Rules, 1972, rr. 26 & 30 – R.H.C. 1980, O.3 r.2(3) & O.38 r.2(3) – Companies Act 1965, ss. 221(2)(c) & 289(1).

This was an appeal from the decision of the High Court reported at [1984] 1 M.L.J. 204. The learned trial judge had made a winding-up order on just and equitable grounds under section 216(1)(i) of the Companies Act. He held that the respondent had joined the company as a shareholder on the basis that he and his son would be given an equal share in the management of the business and that the other shareholders would not use their majority to outvote him on major issues. On appeal it was argued that such an underlying obligation had not been proved and was denied by the appellants.

Held: (1) in the face of the denial that the agreement was ever made, the trial judge should have heard oral evidence before deciding whether the alleged agreement was ever made;

(2) even if the trial judge had been right in his decision to make an order on mere affidavit evidence, he should have so indicated to the parties and given them an opportunity to reach an agreement among themselves and also ascertain the wishes of the creditors and contributories in accordance with section 289 (1) of the Companies Act.

Cases referred to:

(1) *In re Lundie Brothers Ltd.* [1965] 2 All E.R. 692.
(2) *Ebrahimi* v. *Westbourne Galleries Ltd.* [1973] A.C. 360.
(3) *Eng Mee Yong* v. *V. Letchumanan* [1979] 2 M.L.J. 212.
(4) *In re A.B.C. Coupler and Engineering Co.. Ltd.* [1962] 1 W.L.R. 1236.
(5) *Re Wondoflex Textile Pty. Ltd.* [1951] V.L.R. 458.
(6) *Re Straw Products* [1942] V.L.R. 139.
(7) *Re Metropolitan Fuel Pty. Ltd.* [1969] V.R. 328.